Supreme Court, U.S.
FILED

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No. _____

In The

# Supreme Court of the United States

October Term, 1993

JANETTE COLLIER and ALLEN L. FEINGOLD,

*Petitioner,*

v.

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN; ROBERT G. HANNA, Jr., Esq.; W.V. PANGBORNE COMPANY, Inc.; CITY OF PHILADELPHIA; SANDRA MAZER MOSS and GILDA KRAMER,

*Respondents.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Judicial Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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56 pp

## QUESTIONS PRESENTED

1. Whether the panel of the Third Circuit Court of Appeals abused its discretion in granting counsel fees to respondents City of Philadelphia, Kramer and Moss in connection with petitioner's appeal docketed at No. 91-2081, pursuant to F.R.A.P. 38, where such fees were not requested until nine months following dismissal of said appeal by the Court of Appeals?

2. Whether the panel of the Third Circuit Court of Appeals abused its discretion in granting counsel fees to respondents City of Philadelphia, Kramer and Moss in connection with petitioner's appeal docketed at No. 91-2081, pursuant to F.R.A.P. 38, where the panel dismissed the appeal for lack of jurisdiction and did not reach the merits of the appeal?

3. Whether the contrary decisions of two panels of the Third Circuit Court of Appeals as to the frivolousness of the issue sought to be raised in petitioner's appeal docketed at No. 91-2081 warrant the exercise of this Court's supervisory authority?

## LISTING OF PARTIES

Janette Collier – Plaintiff

Allen L. Feingold, Esquire – Counsel for Plaintiff; Petitioner herein

City of Philadelphia – Defendant

The Honorable Sandra Mazer Moss – Defendant

Gilda Kramer – Defendant

W.V. Pangborne Company – Defendant

Robert G. Hanna, Jr. Esquire – Defendant

Marshall, Dennehey, Warner, Coleman & Goggin – Defendant

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## REFERENCE TO REPORT OF OPINIONS

The memorandum opinion and order of the district court at No. 90-6001, E.D.Pa., entered on December 3, 1991, imposing Fed.R.Civ.P. 11 sanctions upon petitioner, is unreported and is included in the appendix at App. 1. The opinion of the Third Circuit Court of Appeals, at No. 91-2081, dismissing petitioner's appeal of the district court's order was issued on October 13, 1992 and is reported at 977 F.2d 93 (3rd Cir. 1992). A copy of this opinion is included in the appendix at App. 20. The order of the district court denying petitioner's motion to extend the time for filing a notice of appeal of the district court's order of December 3, 1991, entered on November 23, 1992, is unreported and is included in the appendix at App. 26. The judgment order of the Third Circuit Court of Appeals, at No. 92-2075, affirming the denial of petitioner's motion to extend the time for filing a notice of appeal of the district court's order of December 3, 1991, was issued on June 30, 1993. The judgment order is reported at 998 F.2d 1002 (3rd Cir. 1993) and included in the appendix at App. 27. The October 4, 1993, order of the Third Circuit Court of Appeals awarding respondents City of Philadelphia, Kramer and Moss counsel fees in connection with the appeal at No. 91-2081 is unreported and is included in the appendix at App. 28. The October 22, 1993, order of the Third Circuit Court of Appeals denying respondents City of Philadelphia, Kramer and Moss counsel fees in connection with the appeal at No. 92-2075 is unreported and is included in the appendix at App. 29. The November 1, 1993, order of the Third Circuit Court of Appeals denying rehearing of the fee award

entered in connection with the appeal at No. 91-2081 is unreported and is included in the appendix at App. 30.

## STATEMENT OF JURISDICTION

The decision of the Third Circuit Court of Appeals from which petitioner seeks a Writ of Certiorari was filed on October 4, 1993. A timely petition for rehearing of this decision was filed and denied by the Court of Appeals on November 1, 1993. This petition is being filed within ninety (90) days of that date pursuant to S.Ct.R.P. 13.1 and 13.4. Jurisdiction is vested in this Court to review the order of the Third Circuit Court of Appeals pursuant to 28 U.S.C. § 1254. Subject matter jurisdiction exists because the decision sought to be reviewed involves an interpretation of the Federal Rules of Appellate Procedure.

## CONSTITUTIONAL PROVISIONS AND STATUTES

F.R.A.P. 38. **Damages for Delay**

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Fed.R.Civ.P. 11. **Signing of Pleadings, Motions, and Other Papers; Sanctions**

> The signature of an attorney or party constitutes a certificate by the signer that the signer has

> read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Third Circuit LAR Misc. 108.1. **Application for Fees.**

(a) Except as otherwise provided by statute, all applications for an award of attorneys' fees and other expenses relating to a case filed in this Court, regardless of the source of authority for assessment, shall be filed within thirty (30) days after the entry of this Court's judgment, unless a timely petition for rehearing has been filed, in which case a request for attorneys' fees shall be filed within fourteen (14) days after the Court's disposition of such petition or suggestion. Such application shall be filed with the Clerk in the time set forth above whether or not the parties seek further action in the case or further review from any Court.

(b) The Court shall strictly adhere to the time set forth above the grant exceptions only in extraordinary circumstances.

## STATEMENT OF THE CASE

In July of 1974, Janette Collier was sitting on the front steps of a building in Philadelphia. A car driven by a drunk-driver struck a light pole near Collier and caused the pole of collapse. The falling pole struck Collier, causing severe and permanent disfiguring injuries. Collier brought an action to recover for her injuries against the uninsured drunk-driver, the City of Philadelphia (which owned the pole) and W.V. Pangborne Company (which installed the pole) in the Philadelphia County Court of Common Pleas.

Collier and her counsel pursued the litigation through discovery, finding all of their efforts resisted by Pangborne and the City. Despite these obstacles, Collier prepared the case for trial and waited several years for the matter to be assigned. Ultimately, the Honorable Murray Goldman was designated to try the litigation. Following the assignment for trial, respondents undertook to engage in additional protracted discovery. Though Collier sought additional discovery as well, her efforts were rebuffed by Judge Goldman.

As the trial of the case commenced, the City and Pangborne produced documents and evidence which they had previously claimed did not exist. Collier's counsel had reviewed these long-pursued documents immediately prior to the commencement of trial. When these

same documents were produced in court, many had been altered; other were destroyed or intentionally misfiled. Collier's counsel called this activity to the attention of Judge Goldman but the judge refused to sanction the defendants.

In the course of trial, Collier did not fare much better. Judge Goldman severely restricted Collier's evidentiary presentation, while allowing Pangborne and the city unfettered latitude. At the close of plaintiff's case, a non-suit was entered in favor of Pangborne. At the close of trial, the jury returned a verdict in favor of the City and against the insolvent drunk-driver.

Strongly believing that the trial court's apparent bias in favor of the defendants was intentional, Collier sought redress in the appellate courts. The Superior Court of Pennsylvania nevertheless affirmed the jury's verdict and the Supreme Court of Pennsylvania declined review.

While the original jury verdict was pending in the appellate courts, Collier commenced litigation against the City, Pangborne and their counsel in Common Pleas Court ("Collier II"). The suit alleged that these entities had conspired to obstruct Collier's efforts to recover for her injuries. An out-of-county judge was specially appointed to preside over this lawsuit. Following consideration of initial preliminary objections, the appointed judge stayed all activity in Collier II pending final appellate disposition of Collier I.

In September of 1988, the Supreme Court of Pennsylvania declined to review Collier I. Collier's counsel believed that such declination commenced the running of the statute of limitations for the bringing of a civil rights

action against the appellees. In reliance on such belief, confirmed by many others in the legal profession, Collier brought suit in the district court in September of 1990 against the appellees under 42 U.S.C. §§ 1983 and 1984, asserting violations of her civil rights. Several pendent state-law claims were also advanced in the action. Thereafter, respondent Pangborne moved for a more definite statement and respondents Marshall, Dennehey and the City of Philadelphia moved to dismiss the complaint. On November 19, 1990, the district court granted Pangborne's motion and denied the motions to dismiss without prejudice to refile them at a later time.

On December 10, 1990, Collier filed an amended complaint. Respondents moved to dismiss this complaint under Fed.R.Civ.P. 12(b)(6). By Order of January 14, 1991, the district court dismissed the complaint and awarded counsel fees to respondents pursuant to 42 U.S.C. § 1988. The court additionally determined that the filing of the amended complaint was in violation of Fed.R.Civ.P. 11 and imposed costs and counsel fees against Collier's attorney. Prior to assessing the amount of the Rule 11 sanction, Collier sought review of the district court's decision in the Court of Appeals. The assessment of Rule 11 sanctions was stayed pending such review.

On July 12, 1991, the Court of Appeals affirmed the judgment of the district court. Thereafter, affidavits were filed by counsel for the respondents in regards to the matter of attorney's fees. On November 25, 1991, the district court conducted a hearing to determine the amount of counsel fees to be awarded. On December 3, 1991, the district court entered an Order awarding

$4,322.69 in counsel fees to respondent Marshall, Dennehey; $2,009.31 in counsel fees to W.V. Pangborne; and $2025.00 in counsel fees to the City of Philadelphia. Thereafter appeal was had to the Court of Appeals in the name of plaintiff, as Feingold was not a party to the litigation.

All parties timely filed briefs addressing the propriety of the sanction order entered against Feingold. All parties agreed in their briefs that the Court of Appeals had jurisdiction to consider the appeal. Nevertheless, on October 13, 1992, the Court of Appeals dismissed the appeal, holding that the taking of the appeal in the name of plaintiff, and the failure of Feingold to appeal in his own right, deprived the court of jurisdiction.

Feingold promptly sought leave in the district court to file a notice of appeal nunc pro tunc in his own name. By order dated November 23, 1992, the district court denied Feingold's request. A timely appeal of the district court's denial was taken. On June 30, 1993, the Court of Appeals affirmed the district court's denial without opinion. A Petition for a Writ of Certiorari was timely filed in this Court. The petition was denied on November 15, 1993.

In the interim, appellees City of Philadelphia, Kramer and Moss filed a petition with the Court of Appeals on July 29, 1993, seeking counsel fees for their efforts with regard to all three appeals of this litigation in that Court. The request for counsel fees in connection with the initial appeal (No. 91-1098) was not accepted due to its untimeliness. The request for counsel fees in connection with the appeal of Rule 11 sanction imposed by the district court

(No. 91-2081) was allowed and counsel fees in the amount of $5,475.00 were awarded by a panel of the court of Appeals on October 4, 1993. A timely petition for rehearing of the order awarding these fees was denied by the same panel Court of Appeals on November 1, 1993. The request for counsel fees in connection with the appeal of the refusal of the district court to allow an appeal out of time of the underlying Rule 11 sanction (No. 92-2075) was denied by a different panel of the Court of Appeals on October 22, 1993.

## ARGUMENT

### I. THE PANEL OF THE THIRD CIRCUIT COURT OF APPEALS ABUSED ITS DISCRETION IN GRANTING COUNSEL FEES TO RESPONDENTS CITY OF PHILADELPHIA, KRAMER AND MOSS IN CONNECTION WITH PETITIONER'S APPEAL DOCKETED AT No. 91-2081, PURSUANT TO F.R.A.P. 38, BECAUSE SUCH FEES WERE NOT REQUESTED UNTIL NINE MONTHS FOLLOWING DISMISSAL OF SAID APPEAL BY THE COURT OF APPEALS

On October 13, 1992, the Third Circuit Court of Appeals dismissed petitioner's appeal of the attorney's fee sanction entered against him under Fed.R.Civ.P 11 (docketed at No. 91-2081) because of a perceived violation of Fed.R.A.P. 3(c). Petitioner's notice of appeal of the sanction order named only plaintiff, Janette Collier, as the appellant; the district court had imposed the Rule 11 sanctions only against petitioner Feingold. It was held that the court lacked jurisdiction to review Feingold's

objections to the sanctions because he was not denominated as an appellant in the notice of appeal.

Upon receiving the opinion of the Third Circuit Court of Appeals, petitioner Feingold immediately sought to perfect an appeal of the Rule 11 sanction order in his own name. To this end, Feingold filed with the district court on October 29, 1992, a motion to file a nunc pro tunc appeal of the sanction order of December 3, 1991. This motion was opposed only by respondent City of Philadelphia.

On November 23, 1992, the district court denied the motion without opinion. The district court's denial was appealed to the Third Circuit Court of Appeals. On June 30, 1993, the Court of Appeals affirmed the district court's denial order without opinion.[1]

On July 29, 1993, respondents City of Philadelphia, Kramer and Moss petitioned the Court of Appeals for counsel fees in connection with both the appeal of the Rule 11 sanction imposed (No. 91-2081) and the appeal of the denial of leave to file a nunc pro tunc notice of appeal of the sanction order (No. 92-2075). On October 4, 1993, the three-judge panel which had dismissed the appeal at No. 91-2081 awarded these respondents $5,475.00 in counsel fees.

The panel in No. 91-2081 abused its discretion in awarding these fees because the respondents' request

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[1] The Third Circuit's denial was issued by way of a preprinted form which the court routinely employs as a notice of decision in those instances where the court does not issue a formal opinion. *See* App. 27.

therefore was untimely. Pursuant to Third Circuit Rule LAR Misc. 108.1(a), any application for counsel fees in that appeal (91-2081) was required to be filed within thirty (30) days of the court's dismissal of the appeal (October 13, 1992), or no later than November 12, 1992. The respondents' request for counsel fees was not filed until July 29, 1993, *eight months* out of time. Pursuant to Third Circuit Rule LAR Misc. 108.1(b), the court of appeals was required to strictly adhere to the above-mentioned thirty (30) day time limitation and to grant exceptions only in the event of extraordinary circumstances. The lone extraordinary circumstance urged by the respondents was the belief that the appeal at No. 92-2075 was a "continuation" of the appeal at No. 91-2081 and they therefore refrained from timely seeking counsel fees in the appeal at No. 91-2081. Third Circuit Rule LAR Misc. 108.1(a), however, provides that an application for counsel fees must be filed within the prescribed thirty day period, *"whether or not the parties seek further action in the case or further review from any Court."* Moreover, this excuse of respondents rings particularly hollow when viewed against their prompt request for fees in the appeal at No. 92-2075, despite the petition to this Court for a writ of certiorari in connection with that appeal.

The panel of the court of appeals which awarded fees in connection with appeal at No. 91-2081 made no finding of extraordinary circumstances which would justify the respondents' failure to request such fees in a timely fashion.[2] In the absence of such a finding, the panel's grant of

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[2] A review of the panel's order of October 4, 1993, suggests that the panel may have mistakenly believed the petition for

counsel fees may only be viewed as an outright disregard of the Third Circuit's Rules governing the time constraints attending F.R.A.P. 38 counsel fee petitions.[3] This unexplained refusal to adhere to its own promulgated rules represents a clear abuse of discretion on the part of the panel that awarded respondents fees. The selective application of local rules of appellate procedure in this fashion is a departure from the usual course of judicial proceedings sufficient to warrant the exercise of this Court's supervisory authority.

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counsel fees in No. 91-2081 to have been timely filed, App. 28. The order granting counsel fees in No. 91-2081 recites that "appellees' motion for an award of attorneys' fees in the appeal at No. 92-2075 *and their motion to file that motion out of time* will be referred to the merits panel in that case." The motion for counsel fees in No. 92-2075, however, was timely filed. It appears that the panel confused the counsel fee petitions, believing that the motion for such fees in 91-2081 was timely and that the motion in No. 92-2075 was filed out of time, as evidenced by the panel's erroneous reference to the non-existent motion to file motion out of time in No. 92-2075.

[3] The Third Circuit Court of Appeals has not hesitated to declare the absence of such findings to be an abuse of discretion in other areas of the law, *see e.g., United States v. Brenna*, 878 F.2d 117 (3rd Cir. 1989) (failure of district court to make explicit factual findings of factors supporting "ends of justice" continuance under the Speedy Trial Act, 18 U.S.C. § 3161, represents abuse of discretion).

## II. THE PANEL OF THE THIRD CIRCUIT COURT OF APPEALS ABUSED ITS DISCRETION IN GRANTING COUNSEL FEES TO RESPONDENTS CITY OF PHILADELPHIA, KRAMER AND MOSS IN CONNECTION WITH PETITIONER'S APPEAL DOCKETED AT No. 91-2081, PURSUANT TO F.R.A.P. 38, BECAUSE THE PANEL DISMISSED THE APPEAL FOR LACK OF JURISDICTION AND DID NOT REACH THE MERITS OF THE APPEAL

As recounted above, the panel of the Third Circuit Court of Appeals which awarded counsel fees to respondents City of Philadelphia, Kramer and Moss in the appeal docketed at No. 91-2081 dismissed that appeal for lack of jurisdiction without considering the merits. Thus, as the Court itself determined it was without jurisdiction to address the issues raised in 91-2081, it could not reach the determination that this appeal was frivolous under F.R.A.P. 38.

While the Third Circuit has not addressed its jurisdiction to impose Rule 38 damages where it lacks jurisdiction to consider the merits of the underlying appeal, the issue has been considered elsewhere. In *Trohimovich v. Commissioner*, 776 F.2d 873 (9th Cir. 1985), the Ninth Circuit Court of Appeals considered the propriety of imposing such sanctions for an appeal it dismissed on jurisdictional grounds. The court there observed that its lack of jurisdiction over the Trohimoviches' "tax protest" appeal, precluded the court's consideration of the frivolousness of the *arguments* advanced by the appeal. The Ninth Circuit noted, however, that it possessed inherent jurisdiction to deter the Trohimoviches' repeated abusive litigation conduct in the Court of Appeals. Noting that

the Trohimoviches had filed fifteen "tax protest" appeals within the preceding five years, the Ninth Circuit imposed sanctions upon each of the Trohimoviches to deter them from further "tax protest" appeals.

The *Trohimovich* court apparently distinguished between two types of jurisdiction sufficient to sustain the imposition of Rule 38 sanctions: 1) jurisdiction over the appeal, enabling the court to impose sanctions upon a finding of frivolousness with regard to the *arguments* advanced in the appeal; 2) inherent jurisdiction, enabling the court to impose sanctions upon a finding of abusive litigation *conduct*. Thus, a lack of subject matter jurisdiction would appear to preclude the imposition of sanctions based upon the merit (or lack thereof) of the appeal, but would not preclude sanctioning abusive litigation conduct determinable independent of an examination of the merits of the appeal itself. Stated differently, Rule 38 does not permit a court of appeals to impose sanctions based exclusively upon the content of the arguments propounded in the appeal, where the court does not possess subject matter jurisdiction over the appeal.

Application of this standard here further undermines the Third Circuit's decision to impose Rule 38 sanctions upon petitioner in the appeal at No. 91-2081. The panel there lacked subject matter jurisdiction over the appeal and could not impose sanctions based solely upon the content of the arguments advanced therein. Because the record is barren of any "abusive litigation conduct" on the part of the petitioner which would support the award of sanctions based on that panel's inherent jurisdiction, there is no basis upon which the panel's award of sanctions may stand.

It is readily apparent that the court of appeals did not provide any factual findings to support its award of counsel fees to respondents. Under prior decisions in the Third Circuit, the panel was required to apply an objective standard to determine whether the appeal at 91-2081 was frivolous, *Hillmon Co. v. Hyatt International*, 899 F.2d 250, 253 (3rd Cir. 1990). Damages under F.R.A.P. 38 may not be awarded unless an appeal is "wholly without merit," *Mellon Bank Corp. v. First Union Real Estate*, 951 F.2d 1399, 1413 (3rd Cir. 1991). "The test is whether, following a thorough analysis of the record and careful research of the law, a reasonable attorney would conclude that the appeal is frivolous," *Hillmon*, 899 F.2d at 254.

The appeal at No. 91-2081 challenged the district court's exercise of discretion in assessing a counsel fee award against petitioner under Fed.R.Civ.P. 11. Petitioner argued that the district court had failed to consider sanctions alternative to an award of counsel fees to remedy the Rule 11 violation. Further, petitioner argued that the district court had abused its discretion in determining the amount of counsel fees to be awarded as a Rule 11 sanction. In his brief, petitioner analyzed the leading Third Circuit decisions on this point and demonstrated that the district court had omitted evaluation of the appropriate equitable factors required to be considered in assessing the amount of the awarded fees. Petitioner further argued that the district court had erred in calculating the lodestar amount with regard to the awarded fees, had failed to consider the duplication of effort among the parties seeking fees and had failed to address the failure of the respondents to mitigate their own damages alleged to flow from the Rule 11 violation. All of these arguments

were supported with citation to precedent and accurate references to the record. Indeed, the respondents, in their motion for F.R.A.P. 38 counsel fees, claimed substantial time associated with researching and responding to the issues raised in petitioner's brief.

The appeal at No. 91-2081 was not wholly devoid of merit and raised a colorable argument regarding the propriety of the district court's counsel fee award under Rule 11. Because of such fact, this appeal could not be deemed frivolous, *Quiroga v. Hasbro, Inc.*, 943 F.2d 346 (3rd Cir. 1991). The decision of the panel of the court of appeals awarding counsel fees in No. 91-2081 is in conflict with prior decisions of the Third Circuit mandating the application of an objective evaluation of the frivolousness of appeals. Such conflict requires reversal of the panel's decision to award such fees here.

## III. THE CONTRARY DECISIONS OF TWO PANELS OF THE THIRD CIRCUIT COURT OF APPEALS AS TO THE FRIVOLOUSNESS OF THE ISSUE SOUGHT TO BE RAISED IN PETITIONER'S APPEAL DOCKETED AT NO. 91-2081 WARRANT THE EXERCISE OF THIS COURT'S SUPERVISORY AUTHORITY

As noted, respondents City of Philadelphia, Kramer and Moss sought damages pursuant to F.R.A.P. 38 in the appeals at both No. 91-2081 and No. 92-2075. The panel in No. 92-2075 decided that appeal on its merits and sustained the holding of the district court. This panel, however, refused to award respondents counsel fees under Rule 38.

The underlying Fed.R.Civ.P. 11 issue was incorporated in both appeals. In No. 91-2081, it was the sole argument advanced. In No. 92-2075, the Rule 11 argument was put forth to facilitate judicial review in the event the Third Circuit panel found in favor of petitioner on the nunc pro tunc notice of appeal issue. Thus, two separate panels of the Court of Appeals, presented with the identical appellate issue and argument have rendered conflicting determinations regarding the frivolousness of the appeal of such issue. The panel at No. 91-2081 evidently found petitioner's Rule 11 argument frivolous; the panel at No. 92-2075 did not.

These conflicting determinations of the same issue warrant review in this Court, for petitioner has no other forum in which to challenge the Third Circuit's irreconcilable decisions regarding the frivolousness of these appeals. Respondents City of Philadelphia, Kramer and Moss have not sought review of the panel's order in No. 92-2075 and the time for seeking such review has now expired. This Court should therefore reverse the decision of the panel at No. 91-2081 to conform that panel's ruling to the unappealed order of the panel at No. 92-2075.

## CONCLUSION

WHEREFORE, petitioner, Allen L. Feingold, Esquire, respectfully requests this Honorable Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

/s/ Allen L. Feingold
ALLEN L. FEINGOLD, Petitioner
Pro se
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Philadelphia, PA 19107
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## INDEX TO APPENDIX

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October 25, 1993

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

**No.** 91-2081

**Re:** COLLIER v MARSHALL, DENNEHEY et al Janette Collier, Appellant

**Present:** STAPLETON, SCIRICA and NYGAARD, Circuit Judges

1. Petition for Reconsideration of Order Awarding Counsel Fees to Appellees City of Phila, et al., by the appellant.

2. A copy of the October 4, 1993 Order is enclosed for your information.

3. Response of Appellees City, Moss & Kramer to Petition of Attorney Feingold for Reconsideration of Order Awarding Attorney's Fee's.

/s/ Barbara Jacobson
Deputy Clerk – Direct Dial 597-8465
Barbara Jacobson

ORDER

The foregoing Motion is/~~are~~ denied.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

Dated: NOV 1 – 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| JANETTE COLLIER | : | CIVIL ACTION |
| v. | : | |
| MARSHALL, DENNEHEY, WARNER, COLEMAN & COGGIN and ROBERT G. HANNA, JR. ESQ. and W.V. PANGBORNE COMPANY, INC. and CITY OF PHILADELPHIA and SANDRA MAZER MOSS and GILDA KRAMER | : | NO. 90-6001 |

ORDER

For the reasons discussed in the attached memorandum, after consideration of all papers and affidavits, and after a hearing, plaintiff's attorney, Allen L. Feingold is hereby ORDERED to pay the following amounts as reasonable attorney's fees and costs, as a sanction for violating Federal Rule of Procedure 11:

1. To Marshall, Dennehey, Warner, Coleman & Coggin, and Robert G. Hanna, Jr. the sum of Four Thousand, Three Hundred, Twenty-Two dollars and Sixty-Nine cents ($4,322.69);

2. To W.V. Pangborne Company, Inc., the sum of Two Thousand, Nine dollars and Thirty-One cents ($2,009.31); and

3. To the City of Philadelphia, the sum of Two Thousand and Twenty-Five dollars even ($2,025.00).

Plaintiff's motion to preclude the attorney's fees of the City of Philadelphia and Sandra Mazer Moss is DENIED.

BY THE COURT:

/s/ Donald W. VanArtsdalen
Donald W. VanArtsdalen, S.J.

December 3, 1991.

App. 4

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-2081

JANETTE COLLIER,

Appellant,

v.

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN; ROBERT G. HANNA, JR., ESQUIRE, W.V PANGBORNE COMPANY, INC.; CITY OF PHILADELPHIA; SANDRA MAZER MOSS; GILDA KRAMER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA (D.C. Civil Action No. 90-06001

Submitted Under Third Circuit Rule 12(6)
September 14, 1992

Before: STAPLETON, SCIRICA and NYGAARD,
*Circuit Judges*

(Opinion filed Oct 13 1992)

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City of Philadelphia,
Sandra Mazer Moss,
Gilda Kramer

OPINION OF THE COURT

NYGAARD, *Circuit Judge.*

Allen L. Feingold, Esq., who represented plaintiff Janette Collier at trial, appeals a Rule 11 order imposing attorney's fees and costs as a sanction against him. We will not consider the merits of Feingold's appeal, but rather will dismiss it because we lack jurisdiction.

I.

In January 1991, the district court granted a defense motion and dismissed plaintiff's complaint. Pursuant to 42 U.S.C. § 1988, it awarded costs and reasonable attorney's fees to defendants. Additionally, it ordered that

> [u]pon the filing of affidavits as to costs and reasonable attorney's fees incurred by defendants, and any response to such affidavits, including any explanation of any mitigating factors, plaintiff's counsel, Allen L. Feingold, shall pay costs and fees as a sanction for violating Fed.R.Civ.P.11.

Plaintiff appealed the motion to dismiss, but since the amount of costs and fees imposed under Rule 11 had not

been determined, the portion of the order awarding them was not appealable. *Napier v. Thirty or More Unidentified Federal Agents,* 855 F.2d 1080, 1089-90 (3d Cir. 1988). Hence, proceedings on the Rule 11 sanctions were stayed pending the appeal. After we affirmed the dismissal, the district court conducted a hearing and issued its order quantifying the amount of the attorney's fees imposed as sanction against Feingold. Janette Collier appeals.

II.

Federal Rule of Appellate Procedure 3(c) provides that the notice of appeal "shall specify the party or parties taking the appeal." The notice of appeal filed by Feingold reads:

> NOTICE is hereby given that Plaintiff, *Janette Collier,* hereby appeals to the United States Court of Appeals for the Third Circuit, from the Memorandum and Order of the Honorable Donald W. VanArtsdalen, entered in this action on the 3rd day of December, 1991.

(emphasis added.)

Feingold filed the notices of appeal, not on his own behalf but on behalf of Collier. The issue is whether we have appellate jurisdiction to review a judgment imposing Fed. R. Civ. P. 11 sanctions on an attorney when the notice of appeals is in the name of the client only. If a party fails to satisfy the requirements of Rule 3(c), we lack jurisdiction over that party. *Torres v. Oakland Scavenger Co.,* 487 U.S. 312, 317 (1988).

Even though the notice of appeal technically varies from the letter of Rule 3(c), it is sufficient if it is the

"functional equivalent" of a notice, 487 U.S. at 317. The functional equivalent to a notice of appeal must, however, identify Feingold as the party taking the appeal. *CTC Imports & Exports v. Nigeria Petroleum Corp.*, 951 F.2d 573, 576 (3d Cir. 1991). Nothing in the record here supports the finding of a functional equivalence nor gives any notice that Feingold is the appellant. The only notice of appeal he filed was on behalf of Collier, which we conclude is not a sufficient notice of appeal on his behalf.

The reasons for this are obvious. Because the standards governing Rule 11 sanctions differ substantially between orders against parties and orders against attorneys, the interests of a client and the interests of an attorney may well conflict in Rule 11 proceedings.

First, unless Collier, represented as she was by an attorney, knowingly commits an act that violates Rule 11, sanctions against her would not be appropriate. Second, a different situation is presented with respect to Feingold, who, because of the professional standards to which he is held, is considered to know the impropriety of his conduct, and from his professional responsibility should act to prevent it. Hence, where the attorney acts improperly or fails to advise an unwary client of the impropriety of the client's conduct, the burden of sanctions should fall entirely upon the attorney. *See Quiros v. Colon*, 800 F.2d 1, 2-3 (1st Cir. 1986). A third situation would be presented where the party herself knows that the filing, and/or the signing is improper, and the attorney reasonably should also know. In this situation, Rule 11 sanctions against both of them are appropriate. *Landon v. Hunt*, 938 F.2d 450, 453 (3d Cir. 1991). Finally, if Collier had misled Feingold, but Feingold nevertheless had an objectively

reasonable basis for his actions, then sanctions against Collier alone would have been appropriate. *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1475 (2d Cir. 1988). Because the interests of a client and her attorney differ, and may indeed conflict, each must appeal if the district court imposes sanctions against them. *Landon*, 938 at 451. Consequently, this notice of appeal would be sufficient only in an appeal from Rule 11 sanctions imposed against Collier. Here, since Allen L. Feingold is the real party in interest, Rule 3(c) requires that he appeal in his own name.

We hold that when sanctions are imposed only upon the attorney and the notice of appeal is in the name of the client alone, we are jurisdictionally barred from considering an appeal of the order imposing sanctions against the attorney.

In so holding, we are in accord with most courts of appeals that have considered the issue. *See DeLuca v. Long Island Lighting*, 862 F.2d 427, 429 (2d Cir. 1988); *Mylett v. Jeane*, 879 F.2d 1272, 1275 (5th Cir. 1989); *Rogers v. National Union Fire Ins. Co.*, 864 F.2d 557, 560 (7th Cir. 1988); *Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249, 1254 (7th Cir. 1989). *See also* 5A Wright & Miller, Federal Practice and Procedure, § 1337 at 133-34 (2d ed. 1990) ("The person sanctioned is the real party in interest on the appeal and should be named in the notice of appeal.") *But see Corp. of the Presiding Bishop v. Assoc. Contractors*, 877 F.2d 938 (11th Cir. 1989) (post-*Torres* case in which the *Torres* decision is not discussed, and where the court concluded that if sanctions are imposed "jointly and severally" against an attorney and client, a notice of appeal in the name of the client alone is sufficient).

In sum, we conclude that because Feingold failed to file the notice of appeal in his own name, and the record contains no functional equivalent of a proper notice of appeal, we lack jurisdiction to review the order imposing Rule 11 sanctions against him. We will dismiss.

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TO THE CLERK:

Please file the foregoing opinion.

/s/ illegible
Circuit Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| JANETTE COLLIER | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | |
| MARSHALL, DENNEHEY, | : | |
| WARNER, COLEMAN | : | |
| & COGGIN and | : | |
| ROBERT G. | : | |
| HANNA, JR. ESQ. | : | |
| and W.V. PANGBORNE | : | |
| COMPANY, INC. and | : | |
| CITY OF PHILADELPHIA | : | |
| and SANDRA MAZER | : | |
| MOSS and | : | |
| GILDA KRAMER | : | NO. 90-6001 |

**MEMORANDUM AND ORDER**

(Filed Dec. 4, 1991)

VanARTSDALEN, S.J. December 3, 1991

Plaintiff was allegedly injured in an accident on July 3, 1974 when an uninsured motorist collided with a street light. She claims that the light fell and struck her face. She filed suit in the Court of Common Pleas against the motorist, the City of Philadelphia (City), and W.V. Pangborne Company, Inc. (Pangborne), which allegedly designed the light standard (*Collier I*). At trial, the court directed a non-suit in favor of Pangborne and the jury found in favor of the City. Plaintiff obtained a verdict against the motorist, which she claims is uncollectible. The verdict was apparently unsuccessfully appealed to the Pennsylvania Superior and Supreme Courts.

In 1984, plaintiff brought a second action in state court against Pangborne; Marshall, Dennehey, Warner, Coleman & Coggin (Marshall, Dennehey), Pangborne's counsel in the original suit; the City; and Sandra Mazer Moss and Gilda Kramer, counsel for the City (*Collier II*). Plaintiff alleged, *inter alia*, that the compulsory non-suit and the jury finding in favor of the City in *Collier I* resulted from improper actions on the part of defendants and their attorneys during the course of that litigation. This suit is still pending in the state courts.

In 1990, plaintiff filed the instant suit in this court. The original complaint in this action was almost identical to the complaint in *Collier II*, except that it added claims under 42 U.S.C. §§ 1983 and 1984, and several new state law theories of recovery. On November 19, 1990, I granted Pangborne's motion for a more definite statement, and denied Marshall, Dennehey's and the City's motions to dismiss, without prejudice to refile the motions at the appropriate time. On December 10, 1990, an amended complaint was filed, which all defendants moved to dismiss.

By order of January 14, 1991, I granted defendants' motions to dismiss. Pursuant to 42 U.S.C. § 1988, costs and reasonable attorney's fees were awarded to defendants. Additionally, I ordered that "[u]pon the filing of affidavits as to costs and reasonable fees incurred by defendants, and any response to such affidavits, including an explanation of any mitigating factors, plaintiff's counsel, Allen L. Feingold, shall pay such costs and fees as a sanction for violating Fed. R. Civ. P. 11."

An appeal was taken,[1] and proceedings in this court were stayed pending the appeal for reasons of judicial economy. The decision was affirmed by the Third Circuit Court of Appeals. Affidavits regarding fees have now been filed by all defense attorneys. Plaintiff's counsel has responded. A hearing was held for the purpose of putting any additional evidence on the record that the attorneys wished to produce. The matter of attorney's fees is now ripe for decision.

## I. The Standard

The Third Circuit has set out standards to be used by district courts in this circuit for the determination of what constitutes a reasonable fee. *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) (*Lindy I*), *appeal after remand*, 540 F.2d 102 (3d Cir. 1976) (*Lindy II*). Though these cases involved attorney's fees charged to unrepresented class claimants, the standards governing reasonable fees are applicable here. *See Napier v. Thirty or More Unidentified Federal Agents*, 855 F.2d 1080, 1093 (3d Cir. 1988) (applying *Lindy II* to a Rule 11 case).

A process was outlined in *Lindy I*, and explained in *Lindy II*, by which a district court calculates a reasonable fee. First, the court should determine the hours spent by the attorney. Included in this determination involves

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[1] Since the amount of fees had not yet been fixed, the portion of the order awarding them was not appealable. *Napier v. Thirty or More Unidentified Federal Agents*, 855 F.2d 1080, 1089-90 (3d Cir. 1988).

breaking down the hours by activity, and by particular attorney (*e.g.*, partner, associate). *Lindy I* at 167. Second, the court should find an appropriate value for the attorney's time. This is generally reflected in the attorney's normal billing rate. The court should fix a reasonable hourly rate, based on such considerations as the attorney's reputation and status in the practice of law. *Lindy I* at 167. Third, the hours reasonably spent are to be multiplied by the reasonable hourly rate. The product of this multiplication is called the "lodestar" amount.

The lodestar can then be reduced or increased based on certain factors. The first of these is the contingency of recovery. This factor is irrelevant in this case.[2] The second factor is the quality of the attorney's work. If the skill of the attorney is unusually good or unusually poor, the lodestar amount can be increased or decreased proportionately. *Lindy II* at 118. There is a heavy burden of proof for such a shift in the lodestar, as the quality of an attorney's work is usually reflected in the reasonable hourly rate, thus already accounted for in the lodestar amount. *Lindy II* at 117-18. There was no attempt to meet this burden in this case.[3]

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[2] When an attorney is to be given reasonable compensation for the work he has done, the contingency of the result is a relevant consideration. However, here the attorney is merely compensated for the reasonable expenses incurred in responding to a frivolous filing. The probability of his success on the merits is not relevant. What is relevant is the reasonable time spent.

[3] Even if there was, it is likely that this factor is also irrelevant in a Rule 11 situation. The reasonable attorney's fees charged to plaintiff's attorney are a sanction. He is not here

In a Rule 11 situation, equitable considerations apply. Thus, if there are any factors which may mitigate the sanctions, the lodestar amount should be reduced accordingly. "A particularly relevant equitable factor is the sanctioned party's ability to pay." *Doering v. Union County Board of Chosen Freeholders*, 857 F.2d 191, 195 (3d Cir. 1988).

Given this framework, consideration of the fees attributable to each defendant's counsel is now appropriate.

## II. The Fees of Marshall, Dennehey

### A. Reasonable Hours

Marshall, Dennehey and Robert G. Hanna, Jr. were represented by Ralph Bocchino of Marshall, Dennehey. Marshall, Dennehey submitted affidavits and detailed time sheets which establish the total hours worked at 27.6 for attorney Bocchino, and the total hours worked at 53.7 for attorney Hausman,[4] on the defense of this action at the district court level.

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paying the reasonable value of services from which he benefitted, he is instead paying the value of services which would not have been performed had he not made a frivolous filing. If his opponent had responded to his frivolous filing with a short submission of remarkable quality, he would not required to pay any more than the reasonable cost of preparing the short submission.

[4] The print-out also includes 1.9 hours billed to other unknown attorneys (under the attorney numbers 76 and 59). As no affidavits have been submitted as to their identities or reasonable hourly rates (though it appears from the print-out that

1. Duplicitous?

Attorney Feingold objects to this breakdown of time only in the most general manner. He argues first that the hours expended are not reasonable because most of the work that went into responding to his complaint was already done, in *Collier II*. I find that this argument is not convincing. I granted the motion to dismiss on statute of limitation grounds. I found that the statute of limitations for § 1983 claims had clearly run in this case. Obviously, this is a federal issue and the research for, and argument on, the issue could not have been done in connection with a lawsuit in state court. Additionally, other federal issues were briefed in this court, and I rested my decision on them as well (*e.g.*, insufficient proof of state action, no respondeat superior liability for government entities under § 1983).[5] Thus, the hours expended by Marshall,

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their time is billed out at $80 per hour), these hours will be excluded from the calculations.

[5] While Feingold is insistent that almost all of the *issues* briefed by Marshall, Dennehey have already been briefed in state court, the majority of the *argument* made was based on federal issues. The 12(b)(6) motion filed on November 7, 1990 by Marshall, Dennehey is instructive. Of a 21-page argument, 12 pages are devoted exclusively to federal claims and the Federal Rules of Civil Procedure, and 2 are devoted to lis pendens (based on the Common Pleas suit). Thus, at least 2/3 of the argument could not have been briefed in the Common Pleas suit.

Though Feingold claims (in an unsworn document improperly called an affidavit) that the issues were presented in state court, he never attached copies of the pleadings filed there, thus I cannot further judge the extent of the duplication.

Dennehey are reasonable, as several new issues were researched and argued before this court.

2. Training?

Second, and in connection with the first claim, Feingold argues that the hours spent were not *really* spent on the lawsuit, but were instead spent training new attorneys. Feingold argues that young associates were allowed to do the work on this lawsuit, and that if a more experienced attorney had been working on it properly, much fewer hours would have been expended. "[T]he counsel on the case was teaching his associate how to do the work and they are requesting that plaintiff's counsel pay for this learning process." (Plaintiff's Affidavit in Opposition to the Affidavits for attorney's fees for the Defendant Marshall, Dennehey, Warner, Coleman & Coggin and Robert G. Hanna, Jr., Esq., third unnumbered page.) Surely Feingold cannot mean to imply that young associates should never work on a case when a more experienced and, presumably, more efficient attorney is available. Moreover, the difference in efficiency is accounted for in the reasonable hourly fees (discussed below). A younger attorney reasonably charges less per hour than a more experienced attorney. Thus young attorneys gain experience, but without overburdening the client with exorbitant fees.

Feingold did not point to any particular items on Marshall, Dennehey's print-out of hours expended with

which he takes issue.[6] To the extent that he did not specifically oppose any time spent, I need not *sua sponte* conduct an in-depth investigation into Marshall, Dennehey's time sheets. *Cunningham v. City of McKeesport*, 753 F.2d 262, 267 (3d Cir. 1985), *vacated on other grounds*, 478 U.S. 1015 (1986) ("In statutory fee cases, however, when an opposing party has been afforded the opportunity to raise a material fact issue as to the accuracy of representations as to hours spent, or the necessity for their expenditure, and declines to do so, no reason occurs to us for permitting the trial court to disregard uncontested affidavits filed by a fee applicant"). Therefore, the figure of 27.6 hours for Bocchino and 53.7 hours for Hausman will be accepted as reasonable.

3. Hours Spent On Appeal

Marshall, Dennehey filed a supplemental affidavit claiming almost $6000 in fees for defending the appeal to

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[6] In Feingold's so-called affidavit, he states:

> Without the opportunity to take the depositions of defense counsel, a bare review of this record, shows the absolute absurdity of defense counsel's actions, alleging this type of work and this amount of work, for reusing and rehashing the same information in two Common Pleas sets of preliminary objections to two Federal Court Motions to Dismiss and one appellate response.

On September 9, 1991, I granted plaintiff's counsel an opportunity to depose defense counsel regarding his rate, experience, hours expended and work performed. Feingold does not experience, hours expended and work performed. Feingold does not claim that Bocchino did not attend his noticed deposition. However, no further objections, specifically those specifying time not reasonably spent, were ever filed or raised at the hearing.

the Third Circuit. These fees cannot be awarded under Rule 11. While in a but-for sense, the fees on appeal were a direct result of the original filing of the frivolous complaint, they cannot be awarded here. Rule 11 governs only district court proceedings, not appellate proceedings. It was for the Court of Appeals to determine, pursuant to Federal Rule Appellate Procedure 38, if the appeal itself was frivolous and would subject appellant to sanction. *Cooter & Gell v. Hartmarx Corp.*, ___ U.S. ___, 110 S. Ct. 2447, 2461-62 (1990) ("We believe Rule 11 is more sensibly understood as permitting an award only of those expenses directly caused by the filing, logically, those at the trial level"). Therefore, these fees will be excluded from the lodestar amount.

B. Reasonable Hourly Fee

Feingold did not take issue with the hourly rates claimed by Bocchino and Hausman. In the face of uncontroverted affidavits as to the fee charged, I have no discretion to refuse to accept the rates. *Black Grievance Comm. v. Philadelphia Elec. Co.*, 802 F.2d 648, 653 (3d Cir. 1986), *Vacated on other grounds*, 483 U.S. 1015 (1987). Therefore, the hourly fees of $135 for Bocchino and $80 for Hausman will be used in calculating the lodestar amount.

As a result, the lodestar amount for Marshall, Dennehey is calculated as follows:

Bocchino:

27.6 hours x $135 per hour = $3,726.00

Hausman:

53.7 hours x $80 per hour = $4,296.00

for a total lodestar of $8,022.00. Marshall, Dennehey also claimed an unopposed amount of $623.38 for costs.

## III. The Fees of W.V. Pangborne

### A. Reasonable Hours

W.V. Pangborne Company, Inc. was represented by Stonelake & Associates (Stonelake), who is their insurer's house counsel. As such, their attorneys are salaried and not paid on an hourly basis. Nonetheless, Stonelake's attorney's keep contemporaneous records of the hours spent on each case, though these records are not itemized by task.

Based on these records, Stonelake claimed that attorney Thorpe worked 17.6 hours on it. Though more detailed records clearly would have been preferred, given the circumstances,[7] I have determined that this total amount of hours is reasonable. In light of the motions which have been filed in this litigation, the hours claimed by counsel in their preparation is reasonable.

### B. Objection

Feingold claims that these hours are unreasonable because contemporaneous time sheets detailing time spent in tenths of the hour were not kept.[8] It is clear from *Lindy*

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[7] It cannot be the case that house counsel can never recover a reasonable attorney's fee because specific records are not kept. Indeed, there is some authority for recovery of attorney's fees when no contemporaneous records have been kept, if the hours spent can be reconstructed. *Lindy II* at 109.

[8] At the hearing, Feingold read from the local rules of the Bankruptcy Court of the Southern District of New York. These rules are obviously not controlling for litigants in the district Court for the Eastern District of Pennsylvania.

*II*, however, that such records need not be kept in order to recover attorney's fees. Rule 11 provides for recovery of a reasonable fee, it does not provide for recovery of a reasonable fee based only on certain documentation.

Feingold also objects that the hours must have been duplicitous.[9] The discussion of this objection above is also applicable here. Additionally, attorney Thorpe was not counsel in the Common Pleas action and he required extra time to "get up to speed" in this case. He did not bill any of this time. The hours claimed were reasonable in light of the pleadings, and are probably an understatement of the time actually spent.

C. Other Hours

Stonelake also claims recovery for 27.5 hours for Thorpe, and 12 hours for law clerks, that were spent on the appeal. These hours are not recoverable. Additionally, a supplemental affidavit was filed for an extra 2 hours for Thorpe and 1.5 hours for attorney Stonelake for the defending of Thorpe's deposition. The deposition was taken by Feingold, in order to better determine the amount of fees to which Stonelake was entitled.

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[9] Not only does Feingold claim that the work was duplicitous of that filed in *Collier II*, he argues that it was duplicitous of the work done by other defendants in this case. Factually, this is incorrect. Pangborne, for example, was the only defendant to move for a more definite statement. While some of the work may have been similarly performed by other counsel, I find the hours claimed by Stonelake to be reasonable in light of their duty to mitigate. had Pangborne been the only defendant in this suit, a higher amount of hours would have been reasonable.

Though it is disputable whether Thorpe could recover for the time his actual deposition was taken,[10] I need not decide the issue. At the hearing, Thorpe was asked the total number of hours he was claiming, and he only claimed the time spent litigating the issue at trial an don appeal. Thus, his claim for these extra hours is deemed waived.

D. Reasonable Hourly Fee

Thorpe requests an hourly fee of $83.33 per hour for himself, and $50 per hour for the law clerks. He referred to this amount as a "bargain basement rate" and I agree. Thorpe has been a member of the Bar since 1983 and he is an experienced litigator.

In attempting to determine the reasonable market rate for Thorpe's services, Feingold directs my attention to the fact that Thorpe's salary is much less than $83.33 per hour.[11] This is irrelevant. *Rodriguez v. Taylor*, 569 F.2d 1231, 1248 (3d Cir. 1977), *cert denied*, 436 U.S. 913 (1978) discussed the calculation of fees for a salaried legal aid

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[10] At this time he was merely acting as a witness, not an attorney.

[11] I note that, at any major law firm, an associate's salary must be less than the rate at which her services are billed out. For example, a young Manhattan attorney, at a "Top Ten" law firm, billing 2300 hours per year at $150 per hour makes much less than $345,000 her fees total. The difference between the income that she generates for the firm and the salary that she is paid pays for the costs of generating that income (office rent, secretarial services, etc.) and the remainder is profit. If salary was equivalent to the reasonable hourly rate, every law firm would be unable to pay its rent.

attorney. The court held that relative salaries may be relevant, as they signal a difference in *relative* reasonable hourly rates, based on differences in expertise and responsibility. However, absolute salaries should not be emphasized. What is relevant is what an attorney with Thorpe's experience would command as an hourly rate in the marketplace. Eighty-eight dollars and thirty-three cents is indeed a "bargain basement rate" for an attorney with 8 years experience in litigation.

As a result, the lodestar amount for Stonelake is calculated as follows:

Thorpe:

17.6 hours x $83.33 per hour = $1,466.61

Clerks:

51.0 hours x $50 per hour = $2,550.00

for a total lodestar amount of $4,016.61. Stonelake also claimed $2 in costs for filing fees.[12]

## IV. The Fees of the City

The City of Philadelphia and Sandra Mazer Moss were represented by attorney Day of the City.

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[12] Stonelake claims $1,456.61 [sic] for Thorpe, $2,550 for clerks and $2 for fees in its first affidavit, filed March 1, 1991. However, Stonelake claims the total fees, expenses & costs equals $4,708.61. With no evidence supporting the extra $700, it will not be awarded.

A. Reasonable Hours

Attorney Day is a salaried public employee. As a result, he does not keep detailed time sheets. He has, however, provided an estimate that he spent 30 hours working on all 12(b)(6) motions in this case. In light of the work performed on this case, it is likely that substantially more time was spent. Thus, an estimate of 30 hours is reasonable. Day does not claim any fees for the time he spent working on the appeal.

B. Reasonable Hourly Fee

Similar to Thorpe, Day is paid a salary. As Day is a public employee, his salary has little relevance to the amount of money that his services would command on the open market. Day has been a member of the Bar since 1967. He is in charge of major trials in the City Solicitor's Office. Obviously, he is an experienced attorney who would command fees similar to those of a partner with a major law firm.

Day claims a fee of $200 per hour. While Day may be correct in his belief that his services would command this hourly rate, it appears out of proportion to fees charged by attorneys with his level of expertise. Thus, his fee should be reduced to $135 per hour.

The lodestar amount for Day is calculated as follows:

30 hours x $135 per hour = $4,050.00

The city did not submit an affidavit as to costs.

C. Objections

Feingold objected to the hours claimed and the hourly rate. He believed that the hours claimed are duplicitous, as well as unsupported. He argued that the hourly rate was disproportionate to Day's salary.

The hours charged must be substantiated. A claim of spending "in excess of 6,000 hours in connection with this litigation" was found to be insufficient. *Lindy I* at 167. Day's estimate, however, is much more specific. He claims that he spent 30 hours in preparation of the 12(b)(6) motions in this case. His claim is a reasonable estimate, not a guess to the nearest thousand. Furthermore, he identified the specific task he performed during those hours. Finally, Day's estimate is a reasonable one, in line with my own estimates based on the pleadings he has filed in this case.

Feingold's objections based on Day's salary are as meritless as those based on Thorpe's salary, and the discussion regarding the latter is equally applicable here.

Finally, Feingold claims that the City should be precluded from receiving fees because Day did not attend his scheduled deposition to be questioned regarding his fees. However, Feingold never filed a motion for sanctions or to compel his attendance. Given that, precluding fees will not be a sanction for missing a deposition. Additionally, Feingold was offered the opportunity to put Day on the stand and question him at the hearing. He declined.

V. Mitigating Factors

As discussed above, a Rule 11 sanction must be mitigated by an attorney's inability to pay. *Doering* held that the deterrent effect of Rule 11 sanctions depends on the sanctioned party's resources. Feingold testified at the hearing that his net worth is negative $250,000.00. His taxable income last year was less than $50,000.00, less than $3,500 of which was generated by his practice of law. Feingold was in partial retirement from legal practice, and he has recently returned full time. Last year, he was not practicing at all until April, as a result of physical injuries.

If I were to eliminate the majority of attorney Feingold's sanction because of his financial condition, I would be, in effect, giving insolvent attorneys license to freely violate Rule 11. While I sympathize with Mr. Feingold, I cannot allow his poverty to be a complete defense to sanctions.

There is some concern that a substantial award against Mr. Feingold might force him into bankruptcy. At the hearing, however, Feingold testified that this was not the case. He said that he will not be bankrupt. If he is ordered to pay, he said that he will pay.

Additionally, now that Mr. Feingold has returned to the full-time practice of law, he has the ability to generate substantial amounts of income. Six or seven years ago, his net worth was over $600,000. While he may be at a low point financially, it appears that he is currently back on the road to financial stability, and that an award against him will be collectible at some future date.

In light of these factors, Mr. Feingold's current financial condition, and his future prospects, I believe that a reduction of 50% is appropriate. Thus, Marshall, Dennehey and Robert G. Hanna, Jr. are entitled to attorney's fees and costs in the amount of $4,322.69. Pangborne is entitled to attorney's fees and costs in the amount of $2,009.31 and the City and Sandra Mazer Moss are entitled to attorney's fees in the amount of $2,025.00.

An order follows

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JANETTE COLLIER,
plaintiff

v.

MARSHALL, DENEHEY, WARNER, COLEMAN and GOGGIN, ET AL.,

defendants

No. 90-6001

Van Artsdalen, S.J.

ORDER

(Filed Nov. 23, 1992)

And now this 23rd day of November, 1992, upon consideration of the petition to appeal nunc pro tunc filed by Attorney Feingold in the instant matter, and upon consideration of the City defendants' response thereto, it is hereby ordered and decreed that the petition is denied.

By the court.

/s/ Donald W. Van Artsdalen
Van Artsdalen, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 92-2075

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JANETTE COLLIER

v.

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN; ROBERT G. HANNA, JR., ESQUIRE; W.V. PANGBORNE COMPANY, INC.; CITY OF PHILADELPHIA; SANDRA MAZER MOSS; GILDA KRAMER

Allen L. Feingold,
Appellant

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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D.C. Civil Action No. 90-06001
District Judge: Hon. Donald W. VanArtsdalen

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Submitted Under Third Circuit Rule 12(6)
June 25, 1993
Before: BECKER, ALITO, and ROTH, *Circuit Judges*

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JUDGMENT ORDER

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After consideration of all contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed. Costs taxed against appellant.

BY THE COURT,

/s/ Illegible
Circuit Judge

ATTEST:

/s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

DATED: JUN 30 1993

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**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

**No.** 91-2081

(E.D. of PA. Civil No. 90-6001)

**Re:** COLLIER vs MARSHALL DENNEHEY Jeanette Collier, Appellant

**Present:** STAPLETON, SCIRICA and NYGAARD, Circuit Judges

1. Motion by Appellees City of Phila., Moss & Kramer for leave to file for attorneys fees on appeal under F.R.A.P. 38 & U.S.C. §1912, treated as a motion of Appellee City of Phila., et al. for leave to file for attorneys fees on appeal under F.R.A.P. 38 & 28 U.S.C. §1912, out of time, together with application in support of same, notified unless Court directs.

2. For your information: Opinion & judgment were filed 10-13-92 in this appeal, and the mandate issued November 4, 1992. This case is reported at 977 F2d 93. Also enclosed is a copy of motion by Appellees City of Phila, et al. for Attorney's fees etc. in our appeal No. 92-2075, which was timely submitted and pending before Circuit Judges Becker, Alito & Roth.

3. Reply to Motion for Attorneys Fees on Appeal, from the appellant. and Reply to Motion Seeking Attorneys Fees Out of time in 91-2081.

/s/ Barbara Jacobson
Deputy Clerk – Direct Dial
597-8465

ORDER

~~The foregoing Motion is/are~~

1. Appellees' motion for attorneys' fees incurred herein is granted in the amount of $5,475.00 (i.e., 36.5 hours X $150/hr.).

2. Appellees' motion for an award of attorneys' fees in the appeal at No. 92-2075 and their motion to file that motion out of time will be referred to the merits panel in that case.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

Dated: October 4, 1993

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

**No.** 92-2075

(E.D. of PA Civ. No. 90-6001)

**Re:** COLLIER v MARSHALL DENNEHEY et al. Allen L. Feingold, Appellant

**Present:** BECKER, ALITO and ROTH, Circuit Judges

1. Motion of Appellee City of Philadelphia, Moss & Kramer, submitted pursuant to Third Circuit Rules 11.1 & 27 for Attorney fees on appeal under F.R.A.P. 38 and 28 U.S.C. § 1912,

2. For your information: A Judgment Order was filed June 30, 1993 in this appeal. Also enclosed for your information is a copy of motion by appellees, City of Phila., et al. for leave to file attorneys' fees out of time, together with affidavit in our appeal No. 91-2081, which is currently pending before Circuit Judges Stapleton, Scirica and Nygaard.

3. Reply to Motion for Attorneys Fees on Appeal, from the appellant, and Reply to Motion Seeking Attorneys Fees Out of time in 91-2081.

/s/ Barbara Jacobson
Deputy Clerk – Direct Dial
597-8465

ORDER

The foregoing Motion is/~~are~~ denied.

By the Court,

/s/ Illegible
Circuit Judge

Dated: OCT 22 1993